

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, and Notices  
Concerning Customs and Related Matters of the  
U.S. Customs Service  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade**

**VOL. 27**

**MAY 19, 1993**

**NO. 20**

*This issue contains:*

U.S. Customs Service

T.D. 93-33 and 93-34

General Notice

U.S. Court of International Trade

Slip Op. 93-59 Through 93-65

Abstracted Decisions:

Classification: C93/44 Through C93/47

## NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

# U.S. Customs Service

## *Treasury Decisions*

(T.D. 93-33)

### FOREIGN CURRENCIES

#### DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR APRIL 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

##### Greece drachma:

April 1, 1993	.....	\$0.004552
April 2, 1993	.....	.004562
April 5, 1993	.....	.004570
April 6, 1993	.....	.004543
April 7, 1993	.....	.004524
April 8, 1993	.....	.004552
April 9, 1993	.....	.004554
April 12, 1993	.....	.004581
April 13, 1993	.....	.004623
April 14, 1993	.....	.004598
April 15, 1993	.....	.004589
April 16, 1993	.....	.004539
April 19, 1993	.....	.004577
April 20, 1993	.....	.004583
April 21, 1993	.....	.004560
April 22, 1993	.....	.004570
April 23, 1993	.....	.004636
April 26, 1993	.....	.004686
April 27, 1993	.....	.004647
April 28, 1993	.....	.004636
April 29, 1993	.....	.004651
April 30, 1993	.....	.004638

##### South Korea won:

April 1, 1993	.....	\$0.001255
April 2, 1993	.....	.001253
April 5, 1993	.....	.001252
April 6, 1993	.....	.001252

**FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for April 1993 (continued):**

**South Korea won (continued):**

April 7, 1993	.....	\$0.001251
April 8, 1993	.....	.001251
April 9, 1993	.....	.001251
April 12, 1993	.....	.001252
April 13, 1993	.....	.001252
April 14, 1993	.....	.001253
April 15, 1993	.....	.001252
April 16, 1993	.....	.001252
April 19, 1993	.....	.001252
April 20, 1993	.....	.001251
April 21, 1993	.....	.001252
April 22, 1993	.....	.001252
April 23, 1993	.....	.001251
April 26, 1993	.....	.001251
April 27, 1993	.....	.001251
April 28, 1993	.....	.001251
April 29, 1993	.....	.001252
April 30, 1993	.....	.001252

**Taiwan N.T. dollar:**

April 1, 1993	.....	\$0.038360
April 2, 1993	.....	.038383
April 5, 1993	.....	N/A
April 6, 1993	.....	N/A
April 7, 1993	.....	N/A
April 8, 1993	.....	.038311
April 9, 1993	.....	.038314
April 12, 1993	.....	.038417
April 13, 1993	.....	.038366
April 14, 1993	.....	.038314
April 15, 1993	.....	.038373
April 16, 1993	.....	.038402
April 19, 1993	.....	.038535
April 20, 1993	.....	.038558
April 21, 1993	.....	.038640
April 22, 1993	.....	.038610
April 23, 1993	.....	.038565
April 26, 1993	.....	.038548
April 27, 1993	.....	.038583
April 28, 1993	.....	.038610
April 29, 1993	.....	.038653
April 30, 1993	.....	.038603

Dated: May 3, 1993.

MICHAEL MITCHELL,  
*Chief,*  
*Customs Information Exchange.*

(T.D. 93-34)

## FOREIGN CURRENCIES

## VARIANCES FROM QUARTERLY RATES FOR APRIL 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93-22 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: None.

## China, P.R. remimbi yuan:

April 5, 1993	N/A
April 6, 1993	N/A
April 21, 1993	N/A
April 22, 1993	N/A
April 27, 1993	N/A
April 28, 1993	N/A
April 29, 1993	N/A

## Finland markka:

April 20, 1993	\$0.181686
April 23, 1993	.183318
April 26, 1993	.186741
April 27, 1993	.185271
April 28, 1993	.184077
April 29, 1993	.183739

## India rupee:

April 12, 1993	N/A
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## Italy lira:

April 23, 1993	\$0.000670
April 26, 1993	.000685
April 27, 1993	.000678
April 28, 1993	.000679
April 29, 1993	.000678
April 30, 1993	.000670

## South Africa, Republic of, rand:

April 12, 1993	N/A
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## Sri Lanka rupee:

April 6, 1993	N/A
April 9, 1993	N/A
April 13, 1993	N/A
April 14, 1993	N/A
April 26, 1993	N/A
April 27, 1993	N/A
April 28, 1993	N/A
April 29, 1993	N/A

**FOREIGN CURRENCIES—Variances from quarterly rates for April 1993  
(continued):****Sweden krona:**

April 26, 1993 ..... \$0.139218

**Thailand baht (tical):**

April 5, 1993 .....	N/A
April 9, 1993 .....	N/A
April 12, 1993 .....	N/A
April 13, 1993 .....	N/A

Dated: May 3, 1993.

MICHAEL MITCHELL,  
*Chief,*  
*Customs Information Exchange.*

# U.S. Customs Service

## *General Notice*

### VALUATION ENCYCLOPEDIA UPDATE AVAILABLE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of availability of the Valuation Encyclopedia Update.

FOR FURTHER INFORMATION CONTACT: Thomas Lobred, Value and Marking Branch, Office of Regulations and Rulings, (202) 482-7010.

#### SUPPLEMENTARY INFORMATION:

The purpose of this notice is to advise the public that an update to the valuation Encyclopedia is now available. The update is comprised of Customs Headquarters rulings and Court cases issued between July 1991 and December 1992.

Copies of this update may be obtained by contacting the Superintendent of Documents, U.S. Printing Office, Washington, D.C., 20402, (202) 783-3238 at a price of \$2.75 per copy. All subscribers of the U.S. Customs Rulings Diskette Subscription Service will receive a copy on diskette as part of their subscription fee. The update will also be available on the Customs Electronic Bulletin Board.

Dated: May 5, 1993.

LARRY COKE,  
(for Karen J. Hiatt,  
Acting Assistant Commissioner,  
Office of Commercial Operations.)



# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10007

*Chief Judge*  
Dominick L. DiCarlo

*Judges*

Gregory W. Carman  
Jane A. Restani  
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas  
R. Kenton Musgrave  
Richard W. Goldberg

*Senior Judges*

James L. Watson  
Herbert N. Maletz  
Bernard Newman  
Samuel M. Rosenstein

*Clerk*

Joseph E. Lombardi



# Decisions of the United States Court of International Trade

(Slip Op. 93-59)

SACHS AUTOMOTIVE PRODUCTS CO., PLAINTIFF v. UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENOR<sup>1</sup>

Court No. 92-04-00271

[Plaintiff's motion to compel discovery denied. Plaintiff's application for expenses under USCIT R. 37 denied. Plaintiff granted leave to submit certain documents for inclusion in administrative record. Defendant's motion for a protective order granted. Defendant's motion pursuant to USCIT R. 11 denied.]

(Decided April 26, 1993)

## Appearances:

*Fenwick & West* (Roger Golden and Christopher Costa, Esqs.), for plaintiff.

*Stuart M. Gerson*, Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*A. David Lafer*, Senior Trial Counsel), for defendant.

## MEMORANDUM OPINION AND ORDER

NEWMAN, *Senior Judge*: This action is brought under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) to challenge the final determinations of the Department of Commerce ("defendant" or "Commerce") that certain clutch release systems of plaintiff ("Sachs") are within the scope of antidumping and countervailing duty orders covering antifriction bearings from Germany (Admin. Rec. 13). The issue currently before the court arises from defendant's motion for a protective order and plaintiff's cross-motion to compel discovery. Additionally, defendant moves for sanctions under USCIT Rule 11 and Sachs seeks expenses and attorney's fees under USCIT Rule 37(a)(3).

## BACKGROUND

In 1989, Commerce issued its final determination of sales at less than fair value in *Antifriction Bearings (Other Than Roller Bearings) and Parts Thereof from the Federal Republic of Germany*. 54 Fed. Reg. 18,992 (May 3, 1989). Thereafter, on June 14, 1991 Sachs filed an Application for Scope Exclusion Determination on Antifriction Bearings; and

<sup>1</sup> Did not appear at oral argument.

on July 15, 1991 Sachs' representatives met with Commerce to discuss the exclusion request ("the July 15 meeting"). Among those present were: Martha J. Butwin, a case analyst who has since left Commerce; Melissa G. Skinner, Program Manager; Roger Golden, counsel for Sachs; and Heinz K. Wolfmaier, the President of Sachs. Wolfmaier has sworn in an affidavit that he produced, *inter alia*, catalogs of both Sachs' and other manufacturers' products at the July 15 meeting.

On March 17, 1992 Commerce issued its final determination, denying Sachs' application. This action followed. Defendant filed the administrative record on June 15, 1992. However, on June 26, 1992 Sachs served defendant with broad discovery requests, seeking to obtain information that it contended was part of the record but was not then on file with the court. Defendant declined to respond to Sachs' discovery requests, invoking the general rule that review under USCIT Rule 56.1 does not permit discovery save under exceptional circumstances. See, e.g., *Saha Thai Steel Pipe Co., Ltd. v. United States*, 11 CIT 257, 661 F. Supp. 1198 (1987).

On November 12, 1992 counsel for Sachs and Commerce met to discuss an informal agreement to add certain documents that Commerce had omitted from the record. Sachs also discussed its "reasonable basis" for believing that *ex parte* communications had occurred between "agent(s) and/or representative(s)" of Federal-Mogul (the defendant-intervenor) and Commerce. The basis for this assertion appears to be a disclosure by the case analyst to Sachs' counsel that she had spoken with some unidentified person at Federal-Mogul a "couple of times," and that Federal-Mogul had thereby communicated its opposition to Sachs' application. Sachs is unable to related with precision or specificity the content of those communications.

## DISCUSSION

### I

Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (1980 & 1993 Supp.), provides that the court shall hold unlawful any scope determination found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B). For purposes of a final scope determination, the record is defined by statute as:

- (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of *ex parte* meetings required to be kept by section 1677f(a)(3) of this title; and
- (ii) a copy of the determination, all transcripts of records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A) (1980 & 1993 Supp.).

Section 1677f(a)(3) provides, in relevant part:

The administering authority and the Commission shall maintain a record of any *ex parte* meeting between—

(A) interested parties or other persons providing factual information in connection with a proceeding, and

(B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,

if information relating to that proceeding was presented or discussed at such meeting.

19 U.S.C. § 1677f(a)(3). Thus, any *ex parte* communication that is required to be recorded under section 1677f(a)(3) is likewise required by statute to be included in the administrative record.

## II

The court initially addresses the issue of the alleged *ex parte* communications. Defendant maintains that discovery should not be granted because judicial review of a countervailing duty decision is limited to the agency record. See *Saha Thai Steel Pipe Co., Ltd. v. United States*, 11 CIT 257, 259, 661 F. Supp 1198, 1201 (1987); *Atlantic Sugar Ltd. et al. v. United States*, 85 Cust. Ct. 131, C.R.D. 80-16 (1980). Nevertheless, Sachs cites an exception to this rule that applies when a plaintiff can show a "reasonable basis" exists to believe that the administrative record is incomplete. *Saha Thai*, 11 CIT at 262, 661 F. Supp. at 1201 (*citing, inter alia*, *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287, 291-92 (D.C. Cir. 1975)). If Sachs were able to demonstrate that *ex parte* communications had taken place, and that these communications involved the exchange or transmittal of information significantly bearing on the scope determination, such information would necessarily be part of the record for review. 19 U.S.C. § 1677f(a)(3). Predicted upon the motion papers and oral submissions before it, however, the court determines that Sachs has not overcome the threshold of the "reasonable basis" test.

At the oral argument held on April 13, 1993 counsel for Sachs asserted that Martha Butwin, the case analyst at Commerce, informed him that she had conducted *ex parte* telephone conversations with someone at Federal-Mogul. But counsel could not identify the person with whom the case analyst had spoken. The nature of the *ex parte* communications between Butwin and the Federal-Mogul representative was apparently to inform Commerce that Federal-Mogul would take a position adverse to Sachs' application for a scope exclusion determination.

Counsel conceded that his recollection of his conversation with Commerce was based on "sketchy" notes and he could not define the substance of the *ex parte* contacts beyond Federal-Mogul's alleged statement that "one bearing is just like any other." In the opinion of the court, Sachs has failed to meet its burden to show that a "reasonable ba-

sis" exists to believe that the communications at issue are of the type that necessarily would have to be recorded, and that the record is incomplete for that reason.<sup>2</sup>

In *Saha Thai*, the Thai plaintiffs strenuously argued that the absence of any record of *ex parte* contacts relating to the President's Steel Program was in itself evidence of an incomplete record, given the highly politically charged nature of the program and its putative relationship with Commerce's application of the unfair trade laws. 11 CIT at 261-62, 661 F. Supp. at 1203. The *Saha Thai* court rejected that argument, holding that mere speculation will not give rise to a "reasonable basis" to doubt the completeness of the record. The same result is compelled here. Although Sachs has satisfied the court that someone at Federal-Mogul telephoned Commerce, it has not been shown that substantive information relating to the scope exclusion proceeding was presented to or discussed with Commerce during those conversations. 19 U.S.C. § 1677f(a)(3). The court has no choice but to guess as to the latter point. Given that the clues before it are somewhat anorectic, the court is not prepared to presume that Commerce has concealed a source of material information that it received in connection with the scope proceeding, and hence, as to the alleged *ex parte* communications, defendant's motion for a protective order is granted.

### III

The court next addresses certain other gaps that Sachs has identified within the record. Sachs moves to compel discovery of several documents, with the object of submitting them for inclusion in the record. First, Sachs seeks discovery with regard to the catalogs of ball and roller manufacturers that it has substantiated were submitted at the July 15 meeting and filed with Commerce during the course of its investigation. Declaration of Heinz K. Wolfmaier at 2, 4. Indeed, Mr. Wolfmaier's affidavit is precise and specific relative to the facts concerning the catalogs he submitted as part of the record. On the contrary, defendant has not adduced evidence that the catalogs were not submitted. Thus, the court deems Sachs' assertion that the catalogs were submitted to be uncontroverted, and considers that the catalogs were presented to and obtained by Commerce during the course of the scope exclusion proceedings.

Although the catalogs must be deemed properly part of the record in this case, the court is informed that Commerce cannot locate them in its files. Additionally, as to certain manufacturers, plaintiff may not be able to submit catalogs of the same edition and year as were originally sub-

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<sup>2</sup> Defendant has additionally raised the contention that the case analyst was not a "decision maker" such as described in 19 U.S.C. § 1677f(a)(3)(B). If the analyst were not such a person, no statutory obligation to record *ex parte* communications would exist, and the record would not be incomplete by virtue of their absence. Since the court determines that Sachs has failed to demonstrate that it is entitled to discovery in any event, *infra*, the court need not decide that issue. It should be noted, however, that a similar argument was met with skepticism in *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 36 (N.D. Tex. 1981).

mitted to Commerce.<sup>3</sup> The problem before the court is, therefore, to what extent Sachs may be permitted to "reconstruct" the information that was before Commerce in the original catalogs.

In *Daewoo Electronics Co., Ltd. v. United States*, 10 CIT 754, 650 F. Supp. 1003 (1986), the court granted a motion to compel the production of data sets in a format that was different from the form in which the data was originally submitted to Commerce. Production of data in a different format was necessary because the defendant-intervenor could not process Commerce's data sets in its own, smaller computer system and Commerce was no longer in possession of the computer instructions according to which its own data sets had been constructed from the raw tapes. The court rejected Commerce's argument that production of the data in sequential files would result in generating data that was not used in the administrative review. 10 CIT at 755, 650 F. Supp. at 1005. Although *Daewoo* merely required Commerce to arrange in a different form the same information that was before it during its review, the factual similarities between *Daewoo* and the instant case are instructive and compelling.

To put the matter simply, if pictures of antifriction bearings and clutch release systems appeared in one edition of a catalog before the agency, it should be no bar to their inclusion in the record that the only present source of the same pictures should be a later edition of that catalog. Following the rationale in *Daewoo*, the court considers that the logical solution herein is to permit Sachs to supplement the record with "substantially similar" documentation from later editions of the relevant catalogs. Sachs, however, is to provide an explanation, under oath, of the variances that may exist between the newer catalogs and the ones originally submitted to Commerce. Such variances, of course, will not be regarded as part of the administrative record. Sachs must also specify, where possible, which of the catalogs are identical to those it originally submitted.

#### IV

The court must deny plaintiff's motion with regard to the following documents:

1. Memorandum to Joseph Spetrini from Richard Moreland, May 10, 1990, A-428-801 (OADC:CH);
2. International Standards Organization (ISO) ball bearing standards including standards determined by Annular Bearing Engineers Committee (ABEC) of Antifriction Bearing Manufacturers Association, Inc. (AFBMA); and,
3. USITC Publication 2374, pages A-1, A-7 and A-8.

<sup>3</sup> Defendant objected to plaintiff's discovery request on the grounds that plaintiff did not submit 10 copies of the catalogs in conformity with 19 C.F.R. § 353.31(e)(2). In light of the fact that Commerce accepted these documents without requiring compliance with the regulation, the court finds that under the facts and circumstances of this case the regulation has been waived by the agency. Parties appearing before Commerce should be on notice, however, that the regulation safeguards their ability to build a complete administrative record, as well as the interests of the agency.

The above documents were cited in Sachs' application, but were not otherwise "presented to or obtained by" Commerce. 19 U.S.C. § 1516a(b)(2)(A)(i). The court agrees with defendant that Commerce is not obligated to locate and copy every document cited in Sachs' application for inclusion in the record. Consequently, their addition at this stage would result in the creation of a "new" record in this court, rather than the record upon which Commerce's action is to be judged. This branch of defendant's motion is accordingly granted.

## V

Plaintiff's motion for attorneys fees under Rule 37(a) and defendant's motion for Rule 11 sanctions are both denied.

## CONCLUSION

The court emphasizes that it is only the faithful application of the rules governing judicial review of administrative action that demands the result here. Although the court recognizes that discovery is the exception and not the rule, the suggestion of secret *ex parte* conferences between Commerce and a domestic manufacturer raises serious concerns that do not disappear for the sole reason that the foreign manufacturer and its counsel have failed to uncover a "smoking gun."

Plaintiff's motion to compel discovery and for attorney's fees is DENIED. Defendant's motion for a protective order is GRANTED. Defendant's motion for Rule 11 sanctions is DENIED.

The court grants plaintiff leave to submit for inclusion in the record substitute catalogs in lieu of those submitted on July 15, 1991. Such supplemental material, along with affidavit(s) as described above, is to be submitted to Commerce no later than May 10, 1993.

In view of the need for an expeditious conclusion to this matter, the following schedule is ordered. Plaintiff will file its motion for judgment on the agency record on or before June 21, 1993. Defendant will file its response brief on or before July 21, 1993. Plaintiff will file its reply, if any, on August 2, 1993. Finally, the parties are directed to append to their briefs copies of any pages that they cite from the administrative record.

(Slip Op. 93-60)

TIANJIN MACHINERY IMPORT & EXPORT CORP. AND SHANDONG MACHINERY IMPORT & EXPORT CORP., PLAINTIFFS v. UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND WOODINGS-VERONA TOOL WORKS, DEFENDANT-INTERVENOR

Court No. 91-03-00223

[Remand determination of the Department of Commerce, International Trade Administration affirmed. Action dismissed.]

(Dated April 27, 1993)

*Skadden, Arps, Slate, Meagher & Flom, (Rodney O. Thorson, John J. Burke), for plaintiffs.*

*Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Marc E. Montalbino), Joan L. Mackenzie, Of Counsel, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendants.*

*Wiley, Rein & Fielding, (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martyn III), for defendant-intervenor.*

## MEMORANDUM OPINION

GOLDBERG, *Judge*: This action comes before the court in connection with the Department of Commerce, International Trade Administration's ("Commerce's") remand determination issued December 22, 1992. The court sustains the remand determination and dismisses the present action in full.

Defendant-Intervenor Woodings-Verona Tool Works ("Woodings-Verona"), a United States importer of heavy forged hand tools, filed an antidumping duty petition on behalf of the United States industry on April 4, 1990 ("Petition"). The Petition alleged that imports of hammers/sledges, bars/wedges, picks/mattocks, and axes/adzes from the People's Republic of China ("PRC") were being sold in the United States at less than fair value.

Plaintiffs, Tianjin Machinery Import and Export Corporation and Shandong Machinery Import and Export Corporation, along with Henan Machinery Import & Export Corporation, are the only three PRC companies that export the subject merchandise.

On December 14, 1990, Mann Edge Tool Company ("Mann Edge"), a domestic producer of heavy striking tools, forwarded a letter to Commerce opposing the Petition. Mann Edge stated that it represented 27 percent of the United States market.

Commerce subsequently issued its final determination on January 3, 1991. See *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China*, 56 Fed. Reg. 241 (Dep't Comm. 1991) (final determination).

Plaintiffs then filed a complaint with this court on April 19, 1991. In addition to challenging several aspects of Commerce's final determination, plaintiffs contended that Woodings-Verona did not have standing to initiate the Petition.

On October 23, 1992, this court issued its opinion in *Tianjin Machinery Import and Export Co. v. United States*, No. 92-195 (CIT October 23, 1992.) In the opinion, the court found that Commerce's final determination was, in part, supported by substantial evidence and in accordance with law. The court accordingly sustained Commerce's determination in part.

However, the court also determined that Commerce failed to provide any indication of the course of conduct it pursued after receiving Mann Edge's opposition to the Petition. Consequently, the court found that Commerce's determination regarding standing was not supported by substantial evidence. The action was remanded to Commerce, with directions that Commerce specify the course of conduct taken as a result of the opposition filed by Mann Edge, in addition to the underlying reasons for its determination.

Commerce filed its remand determination on December 22, 1992. On January 6, 1993, plaintiffs forwarded a letter to the court in which they noted their general desire to challenge Commerce's determination upon remand. Accordingly, on January 14, 1993, the court issued a scheduling order directing plaintiffs to file a Rule 56.1 brief by February 8, 1993. The court instructed the parties that:

It is ordered that upon notification to the Clerk of this Court and to the other parties, a party may decline to submit a new brief in regard to the remand, but may instead rely upon its brief(s) previously filed with the court in this action. Such notification shall be written, submitted no later than the due date for the new brief, and shall designate the full name of the substituted brief with specific identification of the pages within the brief upon which the party relies.

Plaintiffs failed to file their brief by February 8, 1993, or to submit the notification as provided above of their intent to reply upon a previously submitted brief.

USCIT Rule 16(f) provides that:

[i]f a party or party's attorney fails to obey a scheduling or post-assignment conference order \* \* \* the judge, upon motion or the judge's own initiative, may make such order with regard thereto as are just \* \* \*.

The court finds that plaintiffs failed to comply with the court's scheduling order by timely filing a 56.1 brief challenging Commerce's determination on remand. Accordingly, the court affirms Commerce's determination on remand, and dismisses the action.

(Slip Op. 93-61)

TIANJIN MACHINERY IMPORT & EXPORT CORP. AND SHANDONG MACHINERY IMPORT & EXPORT CORP., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND WOODINGS-VERONA TOOL WORKS, DEFENDANT-INTERVENOR

Court No. 91-03-00222

[Remand determination of the United States International Trade Commission affirmed. Action dismissed.]

(Dated April 27, 1993)

*Skadden, Arps, Slate, Meagher & Flom, (Rodney O. Thorson, John J. Burke, R. Nicholas Singh), for plaintiffs.*

*Office of General Counsel, United States International Trade Commission (Lyn M. Schlitt, General Counsel, James A. Toupin, Assistant General Counsel, and Abigail A. Shane) for defendant.*

*Wiley, Rein & Fielding, (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martyn III), for defendant-intervenor.*

## MEMORANDUM OPINION

GOLDBERG, *Judge*: This action comes before the court on plaintiffs' challenge to the United States International Trade Commission's ("Commission's") determination upon remand issued January 15, 1993. The court sustains the remand determination and dismisses the present action in full.

Defendant-Intervenor Woodings-Verona Tool Works ("Woodings-Verona"), a United States importer of heavy forged handtools, filed an antidumping duty petition on behalf of the United States industry on April 4, 1990 (the "Petition"). The Petition alleged, in part, that imports of hammers/sledges, bars/wedges, picks/mattocks, and axes/adzes from the People's Republic of China ("PRC") were being sold in the United States at less than fair value.

Plaintiffs, Tianjin Machinery Import and Export Corporation and Shandong Machinery Import and Export Corporation, along with Henan Machinery Import & Export Corporation, were the only three PRC companies that export the subject merchandise.

The Commission issued its final determination in February, 1991. See *Heavy Forged Handtools From the People's Republic of China*, USITC Pub. 2357, Inv. No. 731-TA-457 (Final) (Feb. 1991). In the final determination, the Commission found that the domestic producers of each class of merchandise suffered material injury as a result of imports.

On April 19, 1991, plaintiffs filed an action with this court challenging the Commission's final determination. Plaintiffs asserted several objections to the Commission's determination, including the contention that the Commission failed to terminate the investigation even though a majority of the domestic hewing tools industry did not support the Petition. Plaintiffs based their argument on the grounds that [ ], a sig-

nificant producer of hewing tools, informed the Commission on November 30, 1990 that it opposed the Petition. In the alternative, plaintiffs also asserted that the Commission was required at a minimum to notify Commerce of any information it possessed regarding lack of domestic support for the petition.

On December 1, 1992, the court issued its opinion in *Tianjin Machinery Import and Export Co. v. United States*, No. 92-214 (CIT December 1, 1992). The court found that the Commission's determination was, in part, supported by substantial evidence and in accordance with law. The court accordingly affirmed the Commission's determination in part.

The court also found that the Commission's final determination was silent on the issue of [ ] opposition to the Petition, and provided no explanation of the Commission's apparent decision that termination of the hewing tool proceeding was not warranted. The court determined that as a result of the Commission's failure to provide any indication of the course of conduct pursued after receiving [ ] opposition, the Commission's final determination was not supported by substantial evidence in this regard only.

The court remanded the action to the Commission with instructions to specify the course of conduct taken as a result of the opposition filed by [ ], and the underlying reasons for its actions. The Commission was specifically directed to provide an explanation for any determination, should one be made, that the statutory language "on behalf of" contained in 19 U.S.C. § 1673a(b) (1988) was not a traditional, jurisdictional standing requirement, or any conclusion that the authority or obligation for determining that the petition was filed "on behalf of" the domestic industry lay with Commerce, and not the Commission.

The Commission issued its response to the remand on January 15, 1993. The Commission stated that:

'[t]he statute explicitly grants authority *only* to Commerce to determine issues of standing in the context of the 20-day sufficiency of the petition determination. \* \* \* [T]he only time that the statute explicitly authorizes the Commission to terminate an investigation on procedural grounds is when a petitioner withdraws a petition.'

Response of the Commission to the Court's Remand Inquiry at 3, quoting *Gray Portland Cement and Cement Clinker from Japan*, USITC Pub. 2376, Inv. No. 731-TA-461 (Final) (Apr. 1991) at 3-13.

The Commission concluded that, consequently, it did not possess the authority to terminate an investigation based on standing issues.

The court notes that the governing statute, 19 U.S.C. § 1673a(b) (1988), mandates that an antidumping petition must be filed "on behalf of an industry." Subsection (c) of Title 19 United States Code, Section 1673a (1988) provides that *Commerce* shall determine whether the petition alleges all necessary elements within 20 days after filing of the petition.

Further, in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 10 Fed. Cir. (T) \_\_\_, 966 F.2d 660, 665 n. 6 (1992), the Federal Circuit recently specified in connection with the statutory provision that a petition be filed "on behalf of" an industry, that:

Although both Commerce and the [Commission] are "charged" with administering different parts of the Act, it is Commerce who determines that a petition is sufficient to cause the initiation of investigations—that the statutory requirements are satisfied. The [Commission]'s position in its brief is that it defers to Commerce's initial determination, and that only Commerce can review that determination. This is a reasonable and permissible interpretation of the Act's delineation of respective responsibilities.

Therefore, the court's obligation is to ascertain whether the Commission decisions to defer to Commerce and to forgo notification to Commerce of standing-related information were "reasonable and permissible." The court finds that under the facts of this action, the Commission's determinations were so supported.

Plaintiffs failed to point to any evidence demonstrating that Commerce could not have fully addressed their standing challenges.<sup>1</sup> Plaintiffs were unable to present any facts explaining why they were prevented from presenting to Commerce [ ] opposition to the petition. Similarly, plaintiffs were unable to show that they forfeited any objections to petitioners' standing as a result of the Commission's deferral to Commerce.

The court holds, therefore, that the Commission's determination upon remand was supported by substantial evidence and in accordance with law. Accordingly, Commerce's determination is affirmed, and the action is dismissed in full.

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<sup>1</sup> Indeed, plaintiffs did challenge Commerce's affirmative finding of standing, in addition to several other aspects of Commerce's final determination, in the companion case of *Tianjin Machinery Import & Export Corp. v. United States*, Court No. 91-03-00223. In *Tianjin Machinery Import & Export Corp. v. United States*, No. 92-195 (CIT October 23, 1992), this court remanded the action to Commerce on this precise standing issue. Upon remand, the court requested explanation from Commerce regarding its refusal to terminate its investigation on the ground the petition was not filed on behalf of the industry. After Commerce provided the justification in its remand determination, plaintiffs declined to further pursue their objections to Commerce's finding of standing. Specifically, plaintiffs chose not to file a USCIT Rule 56.1 brief challenging Commerce's remand determination. As a result, the court affirmed Commerce's determination in full. See *Tianjin Machinery Import & Export Corp. v. United States*, No. 93-60 (CIT April 27, 1993).

(Slip Op. 93-62)

MITSUBISHI MATERIALS CORP., NIHON CEMENT CO., LTD., AND OSAKA CEMENT, ET AL., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS *v.* AD HOC COMMITTEE OF SOUTHERN CALIFORNIA PRODUCERS OF GRAY PORTLAND CEMENT, DEFENDANT-INTERVENOR

Consolidated Court No. 91-06-00426

[Plaintiffs' motion for judgment on the agency record and for remand granted in part and denied in part; Remanded in part to the International Trade Commission.]

(Dated April 27, 1993)

*Akin, Gump, Hauer & Feld, (Patrick F.J. Macrory and Spencer S. Griffith),* for plaintiffs Onoda Cement Co., Ltd.

*Graham & James, (Yoshihiro Saito and Brian E. McGill),* for plaintiffs Mitsubishi Materials Corp., Nihon Cement Co., Ltd., and Osaka Cement Co., Ltd.

*Office of General Counsel, United States International Trade Commission (Lyn M. Schlitt, General Counsel, James A. Toupin, Assistant General Counsel, and Judith M. Czako)* for defendants.

*Kilpatrick & Cody, (Joseph W. Dorn and Michael P. Mabile),* for defendant-intervenor.

## MEMORANDUM OPINION

GOLDBERG, *Judge*: This action comes before the court on plaintiffs' motion for judgment upon the agency record and request for remand. Plaintiffs challenge the final affirmative injury determination by the United States International Trade Commission ("Commission") in *Gray Portland Cement and Cement Clinker from Japan*, USITC Pub. 2376, Inv. No. 731-TA-461 (Final) (Apr. 1991); also published at 56 Fed. Reg. 21,391 (USITC 1991) as amended 56 Fed. Reg. 22053 (USITC 1991). The court sustains the Commission's determination in part. The court also finds that the Commission's determination, in part, was not based upon substantial evidence or in accordance with law, and grants plaintiffs' request for a remand as to the relevant part.

## BACKGROUND

Defendant-Intervenor, the Ad Hoc Committee of Southern California Producers of Gray Portland Cement, filed an antidumping duty petition with the United States Department of Commerce ("Commerce") and the Commission on May 18, 1990. The petition alleged that imports of gray portland cement and cement clinker ("cement and cement clinker" or, collectively, "cement") from Japan were being sold in the United States at less than fair value, and that an industry in the United States was materially injured or threatened with material injury by reason of the imports.

Plaintiffs, Mitsubishi Materials Corp., Nihon Cement Co., Ltd., Osaka Cement Co., Ltd., and Ube Industries, Ltd., along with plaintiff Onoda Cement Co., Ltd., were Japanese exporters of the subject imports and participated in the proceedings before the Commission and Commerce as respondents.

Commerce initiated an antidumping duty investigation on June 7, 1990. *Gray Portland Cement (Including Cement Clinker) from Japan*, 55 Fed. Reg. 24,295 (Dep't Comm. 1990) (Initiation of Investigation). The period of investigation was December 1, 1989 through May 31, 1990. Although Commerce's notice of initiation requested that interested parties notify Commerce of support for or opposition to the petition, no timely challenges to petitioner's standing to file the petition on behalf of the industry were filed.

The Commission issued its affirmative preliminary determination in July, 1990. See *Gray Portland Cement and Cement Clinker from Japan*, USITC Pub. 2297, Inv. No. 731-TA-461 (Prelim.) (July 1990); also published at 55 Fed. Reg. 28,465 (USITC 1990). Commerce issued its affirmative determination of sales at less than fair value on October 31, 1990. *Gray Portland Cement and Clinker from Japan*, 55 Fed. Reg. 45,831 (Dep't Comm. 1990) (prelim. determination).

On February 13, 1991, plaintiffs filed a request that the Commission terminate its investigation on the ground that defendant-intervenor did not represent the industry on whose behalf the petition was filed.

The Commission issued its final affirmative determination in April, 1991. *Gray Portland Cement and Cement Clinker from Japan*, USITC Pub. 2376, Inv. No. 731-TA-461 (Final) (April 1991); also published at 56 Fed. Reg. 21,391 (USITC 1991), as amended 56 Fed. Reg. 22,053 (USITC 1991) ("Commission Report"). The Commission found that gray portland cement and clinker had a low value-to-weight ratio and was fungible. Further, its high transportation costs tended to make the areas in which it was produced and marketed isolated and insular. Commission Report at 16, 17. Additionally, inventories were generally not maintained for long, or at high levels, because of the high costs of storage. Commission Report at 25.

The Commission also found that cement production was historically subject to cyclical performance, with poor performance in periods of low or declining consumption, and boom performance during periods of high or increasing consumption. Commission Report at 28. It concluded that "[o]ver the period of investigation, the cement market in Southern California was characterized first by a strong surge in demand, and by declining consumption in the most recent period." Commission Report at 28.

The Commission also found that, pursuant to 19 U.S.C. § 1677(4)(C) (1988), in April, 1991 a regional industry in the United States was materially injured or was threatened with material injury by reason of unfairly traded imports. Commissioners Lodwick and Newquist ("the Commission majority") determined that the relevant industry was materially injured. Through the use of an aggregate analysis which was highlighted by producer-by-producer information, the Commission majority found that a sufficient percentage of the relevant industry was injured.

Also, in its determination, the Commission majority defined the regional industry as the domestic producers of cement in Southern California. In finding injury, the Commission majority cumulatively assessed the volume and effect of imports of a like product from Mexico with the subject Japanese imports. The cumulated Mexican imports were subject to an antidumping duty order issued on August 30, 1990. *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 35,443 (Dep't Comm. 1990) (Antidumping Duty Order).

In a separate opinion, Commissioner Rohr found that the industry was threatened with material injury. Commissioner Rohr determined that the relevant industry was threatened by material injury based upon a "percentage of production" analysis. In this method, Commissioner Rohr examined aggregate indicators of industry performance as well as how aggregates were affected by individual plant performance.

The Commission majority and Commissioner Rohr also rejected plaintiffs' request for termination on the grounds that Commerce retained exclusive jurisdiction to make standing determinations and to decide challenges to standing. Finally, Commissioner Brunsdale issued a negative determination of injury.

On May 10, 1991, Commerce issued an antidumping duty order, and amended its final determination to find 63.73 percent and 45.29 percent weighted-average dumping margins. *Gray Portland Cement and Clinker from Japan*, 56 Fed. Reg. 21,658 (Dep't Comm. 1991) (Antidumping Duty Order).

Both plaintiffs Mitsubishi Materials Corp. et al. and Onoda Cement, Co., Ltd. filed separate complaints before this court challenging several aspects of the Commission majority's and Commissioner Rohr's determinations. Ube Industries, Ltd., however, withdrew as a plaintiff on September 11, 1991. The court consolidated both actions together on November 1, 1991 under *Mitsubishi Materials Corp., et al. v. United States*, Consolidated Court No. 91-06-00426.

#### DISCUSSION

##### I. Standard of Review:

An antidumping determination will be overturned only if it is not supported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. 1516a(b)(1)(B) (1988). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *N.A.R., S.p.A. v. United States*, 14 CIT 409, 412, 741 F. Supp. 936, 939 (1990) (quoting *Gold Star Co. v. United States*, 12 CIT 707, 708-709, 692 F. Supp. 1382 (1988) *aff'd*, 8 Fed. Cir. (T) \_\_\_, 873 F.2d 1427 (1989)). See also *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 50, 592 F. Supp. 1318 (1984).

The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383

U.S. 607, 620 (1966). This standard of review accords deference to an agency's conclusions. It is not the court's function to decide that it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927 (1984). The court will affirm the determination of the Commission when it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence. *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556 (1984).

Moreover, "if the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted).

## II. Concentration of Imports:

In an antidumping duty investigation, the Commission is charged with determining whether:

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports \* \* \*.

19 U.S.C. §§ 1671d(b)(1) (1988) and 1673d(b)(1) (1988).

When defining "industry," 19 U.S.C. § 1677(4)(C) (1988) provides that the Commission may, in appropriate circumstances, employ a regional analysis of the domestic industry. In these cases:

the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—

(i) the producers within such market sell all or almost all of their production of the like product in question in that market, and

(ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

In such appropriate circumstances, material injury [or] the threat of material injury \* \* \* may be found to exist with respect to an industry even if the domestic industry as a whole \* \* \* is not injured, if there is a concentration of \* \* \* dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury \* \* \*.

19 U.S.C. § 1677(4)(C) (1988) (emphasis added).

Plaintiffs first contend that the Commission majority erred in its evaluation of whether imports were concentrated in the Southern Cali-

fornia region. The Commission majority supported its affirmative finding of "concentration of imports" by stating that:

[t]here is no precise numerical limit for determining when imports are sufficiently concentrated in the region. The percentage of total Japanese imports to the United States entering Southern California was 67.9 percent in 1986, 70.8 percent in 1987, 73.0 percent in 1988, 73.7 percent in 1989, and 61.2 percent in 1990. \* \* \* In the circumstances of this industry, and based on the information of record, we conclude that imports from Japan are sufficiently concentrated to warrant consideration of material injury or threat thereof to [the] regional industry \* \* \*. [Footnote] 47/ (Commission Report at 20-21, remaining footnotes omitted.)

In footnote 47, the Commission majority noted that the Southern California region was a significant market in the United States as a whole since it accounted for between 8 and 9.8 percent of total United States consumption of cement during the period of investigation. Accordingly, it felt that "consideration of the relative import penetration in the region and in the remainder of the United States" was warranted. Commission Report at 21 n. 47. The Commission majority found:

[m]arket penetration of Japanese imports in Southern California increased from 4.9 percent in 1986 to 18.2 percent in 1989, before declining in 1990 to 14.7 percent. In the United States as a whole, market penetration of Japanese imports increased from .6 percent in 1986 to 2.4 percent in 1989, before declining in 1990 to 2.2 percent. \* \* \* Thus, in a market accounting for a significant portion of total U.S. consumption, imports accounted for a much higher share of consumption than in the remainder of the country. While we do not consider this comparison determinative, and would not consider it of much weight if Southern California represented but a very small share of overall U.S. consumption, in the circumstances of this case, it lends further support to our conclusion that imports are sufficiently concentrated \* \* \*. (Commission Report at 21 n. 47)

Plaintiffs challenge several facets of the Commission majority's affirmative finding of sufficient import concentration. Plaintiffs first contend that pursuant to longstanding precedent, the Commission has required percentages of Japanese imports to the United States entering Southern California to be at least eighty percent before finding a sufficient concentration of imports. Here, the percentage of Japanese imports entering Southern California fell well below this level, and substantial evidence does not support the Commission majority's finding of adequate concentration.

Secondly, plaintiffs point out that in addition to Southern California, imports of Japanese cement were significantly concentrated in three other isolated regions, including Alaska, Hawaii, and the Pacific Northwest. In Alaska, Japanese cement represented 50 percent of consumption, while in Hawaii it was 25 to 40 percent, and in the Pacific Northwest it represented 15 to 21 percent of consumption. The Commission majority cannot bolster its already faulty concentration deter-

mination by relying as it did upon the "market penetration" test—the comparison of import market share in the region with import share in the United States generally—because this test was "repudiated" by the Commission in situations where imports were concentrated in other isolated areas rather than dispersed throughout the United States. See *Crushed Limestone from Mexico*, USITC Pub. 2533, Inv. No. 731-TA-562, (Prelim.) (July 1992).

Lastly, plaintiffs argue that if the Commission majority can properly rely upon the market penetration test, it must compare import market penetration in Southern California with market penetration in the other regions where imports were concentrated, instead of in the United States as a whole.

The court finds plaintiffs' arguments unconvincing. While the Commission has generally found percentages higher than 80 percent of total imports to be sufficient<sup>1</sup>, it has recognized that "because cases before the Commission are likely to involve different factual circumstances, a precise mathematical formula will not always be reliable in determining the minimum percentage which constitutes sufficient concentration." *Certain Steel Wire Nails from the Republic of Korea*, USITC Pub. 1088, Inv. No. 731-TA-26 (Final) (Aug. 1980), at 20 (citation omitted).

Further, the Commission has also previously found that percentages substantially less than eighty percent to be sufficient concentrations to warrant a regional analysis. In fact, the Commission specifically noted that "[t]here may be instances in which shipments of less than 50 percent may be considered a concentration of the \* \* \* dumped imports within the region." *Certain Steel Wire Nails from the Republic of Korea*, USITC Pub. 1088, Inv. No. 731-TA-26 (Final) (Aug. 1980), at 20. For example, the Commission determined in that case that 43 percent of dumped imports into the region was adequate to establish concentration of imports. In *Fall-Harvested Round White Potatoes from Canada*, USITC Pub. 1463, Inv. No. 731-TA-124 (Final) (Dec. 1983), the Commission found that 68 percent of total imports was sufficient.

Consequently, the court finds that the Commission majority's determination was supported by substantial evidence that percentages of Japanese imports entering Southern California, such as 67.9 percent in 1986, 70.8 percent in 1987, 73.0 percent in 1988, 73.7 percent in 1989, and 61.2 percent in 1990, constituted sufficient import concentration.

Next, the Commission majority also properly employed a market penetration analysis. The legislative history of the Trade Agreements Act of 1979 clearly envisioned utilization of a test of this nature. The Statements of Administrative Action to the Trade Agreements Act of 1979, which was expressly approved by Congress in 19 U.S.C. § 2503(a) (1988), states that "[c]oncentration of \* \* \* dumped imports could be

<sup>1</sup> E.g., *Portland Hydraulic Cement From Australia and Japan*, USITC Pub. 1440, Inv. Nos. 731-TA-108 and 109 (Final) (Oct. 1983); *Offshore Platform Jackets and Piles from the Republic of Korea and Japan*, USITC Pub. 1848, Inv. No. 701-TA-248 (Final) (May 1986).

found to exist if there is a clearly higher ratio of such imports to consumption in [the regional] market than the ratio of such imports to consumption in the remainder of the United States market." H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 44 (1979). The Ways & Means Committee of the House of Representatives provided that in a regional analysis, "concentration could be found to exist if the ratio of such imports to consumption is clearly higher in the regional market than in the rest of the U.S. market." H.R. Rep. No. 317, 96th Cong., 1st Sess. 73 (1979). The Senate Finance Committee's report on the 1979 Trade Agreements Act explains that the "requisite concentration will be found to exist in at least those cases where the ratio of the [dumped] imports to consumption of the imports and domestically produced like product is clearly higher in the relevant regional market than in the rest of the U.S. market." S. Rep. No. 249, 96th Cong., 1st Sess. 83 (1979).

Moreover, in *Crushed Limestone from Mexico*, USITC Pub. 2533, Inv. No. 731-TA-562, (Prelim.) (July 1992), the Commission reiterated that it maintained "discretion to analyze import concentration" based upon market share. *Id.* at 14.

In their effort to distinguish these precedents, plaintiffs quote qualifying language in *Crushed Limestone from Mexico*, USITC Pub. 2533, Inv. No. 731-TA-562 (Prelim.) (July 1992) which provides that application of the market share theory was unwarranted because imports in that case were overwhelmingly limited to a ten state region and not "dispersed widely throughout the country." *Id.* at 14.

Plaintiffs' argument, however, not only ignores the relevant legislative history, it overlooks the express explanation of the Commission majority that under the circumstances of the instant case, sole reliance upon the market penetration theory would be inappropriate and not "determinative." The Commission majority's finding of concentration rested primarily upon the fact that a sufficient percentage of imports were concentrated in Southern California. The market penetration analysis only lent "further support to our conclusion that imports are sufficiently concentrated \* \* \*." Commission Report at 21 n. 47. Plaintiffs were wholly unable to demonstrate that the Commission majority's secondary consideration of the market penetration test was not supported by substantial evidence or in accordance with law.

Similarly, plaintiffs failed to provide any legal, legislative, or factual support for their last argument that the court should disregard long settled Commission practice and specific legislative history and require the Commission to contrast the penetration of Japanese imports into Southern California with the market share of the imports in other specific regions, such as Alaska, Hawaii or the Pacific Northwest.

Consequently, the court finds that substantial evidence supports the Commission majority's determination that imports of Japanese cement were sufficiently concentrated in Southern California.

### III. Injury to the Regional Industry:

Plaintiffs also assert that the Commission majority erred by finding the Southern California region was materially injured. Title 19 of United States Code, Section 1677(4)(C) (1988) provides that the Commission may find material injury in a regional analysis when "the producers of all, or almost all, of the production within that [regional] market are being materially injured or threatened by material injury \* \* \*."

In interpreting the "all, or almost all" standard, the court in *Cemex, S.A. v. United States*, 16 CIT \_\_\_, 790 F. Supp. 290 (1992), *aff'd*, Nos. 92-1343, -1394 (Fed. Cir. Feb. 8, 1993), held that the Commission did not err in failing to apply a fixed percentage test of eighty to eighty-five percent when evaluating whether imports of Mexican cement were dumped into the region of the southern-tier states of California, Texas, Arizona, New Mexico, Alabama, Louisiana, Mississippi, and Florida. The court stated that "there is nothing in the statute, case law, or administrative practice to indicate Congressional intent to bind [the Commission] to a precise numerical percentage." Rather, these determinations are "to be made on a case-by-case basis." *Id.* at 294.

Plaintiffs claim that in this case, the all, or almost all standard must be strictly enforced to require a significant percentage, such as 80 to 85 percent, and this criterion was not met here. Plaintiffs argue that, contrary to the facts in *Cemex*, 790 F. Supp. at 290, Southern California represented a small proportion of total United States production. Unless the Commission majority finds that a high percentage of the relevant industry was injured, nationwide duties would be imposed even though only a small portion of United States production was actually injured. Moreover, substantial evidence in the record does not support a finding of injury to a significant percentage of the industry since the regional industry "as a whole was performing well" and [ ] demonstrated no injury and aggregated data showed the overall good health of the industry. Plaintiffs' Memorandum of Points and Authorities in Support of Rule 56.1 Motion for Judgment on the Agency Record ("Plaintiffs' Memorandum") at 22.

Further, plaintiffs contend that the Commission majority primarily relied upon an aggregate methodology, and failed to use a pure "plant-by-plant" analysis when determining whether a sufficient percentage of individual plants in Southern California suffered injury. In addition, the Commission majority's cursory explanation that plant-by-plant information substantiated aggregate findings was not supported by substantial evidence. Finally, plaintiffs conclude that the Commission majority's determination contained internal contradictions, and failed to fully explain certain findings.

The court notes from the outset that "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not \* \* \* question the agency's

methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404-405, 636 F. Supp. 961 (1986) *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). Consequently, the court must evaluate whether the findings that a sufficient percentage of the regional industry suffered injury and whether the methodology chosen by the Commission majority were reasonable and supported by substantial evidence.

In regard to the first issue, the court notes that the Commission is not required to find that a fixed percentage of the regional industry was injured. *See Cemex*, 790 F. Supp. at 290. The Commission is not limited to a precise numerical percentage; instead, determinations of this nature are "to be made on a case-by-case basis." *Id.* at 294.

In the case at bar, substantial evidence shows that as a whole, the regional industry did evince injury. Commission Report at 24-29. For example, regional capacity to produce cement and clinker "demonstrated an inverse relationship to production level during 1986-1990, falling 1 percent and 9 percent respectively." Commission Report at 24, Staff Report at A-23 and Table 7. In an industry where inventories were not maintained, inventories of cement rose by 69 percent, and employment within the industry declined. Moreover, "[d]espite increases in the domestic industry's operating income, the industry has suffered significant declines in market share. Further, domestic prices have declined notwithstanding increased demand over much of the period of investigation." Commission Report at 29 (footnote omitted).<sup>2</sup>

Substantial evidence also demonstrates that [ ] despite plaintiffs' argument that [ ] "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). Evidence in the record shows that [ ]

[ ] Confidential Document No. 19, Exhibit 22 at 10-11. *See also* Confidential Document No. 19, Exhibits 20, 36, 37; Public Document 183, Testimony of William McCormick and Charles L. May.

Accordingly, the court finds the Commission majority's determination that all, or almost all of the regional domestic industry suffered injury was supported by substantial evidence.

The court must next address plaintiffs' argument that the Commission majority's methodology for evaluating injury to Southern California was unreasonable and not supported by substantial evidence.

In a regional analysis, the Commission may evaluate injury through utilization of an "aggregate" method in which the Commission evaluates industry averages, or it may use a "plant-by-plant" analysis. In this method, the Commission examines injury indicators on a plant-by-plant

<sup>2</sup> Plaintiffs also assert that [ ] the petition. Therefore, they contend, this comprises further evidence that all, or almost all of the domestic regional industry was not injured. Plaintiffs' theory fails to recognize that [ ] Further, [ ] does not, *ipso facto*, signify that the producer was not injured.

basis and then determines whether individual companies exhibiting injury compromise all, or almost all of production.

In explaining its methodology for finding injury, the Commission majority stated that while an analysis of the aggregate information indicated injury, it also considered:

the information on industry performance on a plant-by-plant basis in the record. We note that, in most cases, the company specific information did not reveal any significantly different performance than did the industry information as a whole. Commission Report at 24 (footnote omitted).

The Commission majority concluded that:

The fungible character of cement, and the localized nature of competition in the Southern California market, support our conclusion that no producer is shielded from the injury to the industry reflected by these trends. Our consideration of the plant-specific information on the record bears out this observation, as does our consideration of various data presented in the "percentage of production" aggregates. *Id.* at 29.

In *Cemex*, 790 F. Supp. at 290, the most definitive case in this area, the court provided that "although a pure producer-by-producer analysis is not required by statute, examination of individual plant information can highlight anomalies that an aggregate analysis would disguise." *Id.* at 295.

Plaintiffs contend that this action was best suited for a pure plant-by-plant investigation. Unlike the facts in *Cemex* where over 40 producers existed, only seven plants operated in Southern California. Consequently, they argue, each individual plant had a greater impact on the average and [ ] was not injured.

The court finds that the Commission majority was not required to adopt the pure plant-by-plant inquiry as plaintiffs would like. Use of either a straight aggregate or pure plant-by-plant method in determining injury in a regional analysis is not mandated by statute or case law. See *Cemex*, 790 F. Supp. at 290. Further, in the only case in which this court required a producer-by-producer analysis, *Atlantic Sugar, Ltd. v. United States*, 2 CIT 295 (1981), the Federal Circuit noted in dicta on appeal in the related action of *Atlantic Sugar, Ltd. v. United States*, 6 CIT 190, 573 1142 (1983) that the statute did not require a plant-by-plant inquiry. *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 744 F.2d 1556 (1984).

The court, nevertheless, recognizes that in certain actions analysis of company specific data is vital because it can "highlight anomalies that an aggregate analysis would disguise." *Cemex*, 790 F. Supp. at 290, 295. The court finds that the case at bar is just such an action, especially in light of the fact that only a limited number of plants are involved. Accordingly, the court must next determine whether the Commission majority sufficiently reviewed plant-by-plant information.

The Commission majority's discussion of specific plant-by-plant data was sparse because it found that "[c]ompany specific information is confidential, and is therefore not specifically discussed." Commission Report at 24 n. 53. The Commission majority explained that it "carefully considered" plant-by-plant information and that it did not "reveal any significantly different performance" than the industry viewed in total. *Id.* at 24. Further, "[t]he company specific information varies in the extent of increases and declines in various operating performance indicators during the period of investigation, but shows largely the same overall trends. \* \* \* We also have considered data on the number of plants reporting annual decreases in various financial indicators during the period of investigation." *Id.* at 27 n. 77. It concluded that "[o]ur consideration of the plant-specific information on the record" supported its observation that "no producer is shielded from the injury to the industry \* \* \*." *Id.* at 29.

While the Commission majority is presumed to have considered all evidence in the record, and company specific information was available to the Commission, the Commission majority discussed the plant-by-plant information in only very general terms. Although it is apparent that the Commission majority did examine plant-by-plant information, the court cannot review whether the Commission majority's conclusion that the data itself substantiated the aggregate methodology's indications of injury because the Commission revealed so little of its reasoning. Therefore, the court remands this portion of the determination to the Commission so that it may provide further explanation of its decision. If the Commission finds itself constrained by the confidential nature of company specific information, it should issue a confidential determination.

Plaintiffs next assert that the Commission majority's determination was internally contradictory. They claim that the Commission majority "characterized a decline of 1.5 percentage points in industry average operating margins between 1989 and 1990 as 'significant,' when concluding that the regional industry as a whole was suffering material injury. The [Commission majority] also stated that company-specific information did not reveal any 'significantly different performance than did the industry information as a whole.'"<sup>3</sup> Plaintiffs' Memorandum at 29 (emphasis added) (footnotes omitted).

Plaintiffs argue that in point of fact, averages of operating profit margins for individual producers varied far more than [ ] from industry averages. Therefore, the Commission majority's statement that "significantly" disparate plant-by-plant information "significantly" supported aggregate findings was contradictory and not supported by substantial evidence.

<sup>3</sup> As discussed previously, the Commission majority stated that, "in most cases, the company specific information did not reveal any significantly different performance than did the industry information as a whole." Commission Report at 24.

The court notes as a prefatory matter that the Commission majority determined that declines in *operating income*, rather than *operating income margins*, were "significant". However, as discussed previously, the court cannot determine at this juncture whether the Commission majority's general conclusion was supported by substantial evidence that *in most cases* company specific information failed to reveal significant differences in performance than did industry aggregate data. Therefore, the court cannot evaluate whether the Commission majority's determination was internally inconsistent, and reserves judgment on this issue until after determination by the Commission majority upon remand.

Lastly, plaintiffs assert that the Commission majority failed to explain its final conclusion that "various data presented in the 'percentage of production' aggregates" confirmed the observation that all, or almost all of the regional industry suffered injury. Commission Report at 29.

However, the Commission is not required to discuss all information upon which it relied in making its determination, especially where, as in this case, the agency's path may be reasonably discerned from the determination. *Negev Phosphates Ltd. v. U.S. Department of Commerce*, 12 CIT 1074, 1083, 699 F. Supp. 938 (1988); *Roses Inc. v. United States*, 13 CIT 662, 668 720 F. Supp. 180, 185 (1989).

In conclusion, the court determines that the Commission majority's finding that all, almost all of the regional domestic industry suffered material injury was, in part, supported by substantial evidence and in accordance with law. The court also remands the case, in part, to the Commission for further explanation.

#### IV. Cumulation of Mexican with Japanese Imports:

Plaintiffs next challenge the Commission majority's cumulation of imports of cement from Mexico with imports from Japan for purposes of assessing material injury.

Title 19 of United States Code, Section 1677(7)(B) (1988) provides that in connection with its material injury investigation, the Commission shall consider, among other factors, the volume of imports and the effect of the imported merchandise on prices in the United States for like products. Subsection (iv) of Title 19 United States Code Section 1677(7)(C) (Supp. III 1991) further specifies that when evaluating volume and price effects:

the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

The seminal case in this area, *Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) \_\_\_, \_\_\_, 901 F.2d 1097, 1101 (1990), specified that "[t]o include imports in the cumulation equation, the statute requires they be 'subject to investigation,' 'compete' with like products, and implies that they be marketed 'reasonably coincident' in time \* \* \*."

Plaintiffs challenge the Commission majority's cumulation of imports from Mexico with Japanese imports on grounds that Mexican imports were not subject to investigation, the Mexican investigation concerned a different regional industry than the present action, and finally that Mexican imports must also be cumulated when determining whether imports were sufficiently concentrated in Southern California. Because the court determines that substantial evidence does not support the Commission majority's determination that imports of Mexican cement were subject to investigation, plaintiffs' remaining challenges to cumulation need not be addressed by the court.

Plaintiffs rest their assertion that Mexican imports of cement were not properly subject to investigation upon *Chaparral Steel Co. v. United States*, 901 F.2d at 1097, and *Chr. Bjelland Seafoods A/C (Now Norwegian Salmon A/S) v. United States*, No. 92-196 (CIT October 23, 1992), appeal docketed, No. 93-1235 (Fed. Cir. Mar. 4, 1993) ("*Norwegian Salmon*"). They argue that the Federal Circuit and this court abrogated the grounds upon which the Commission majority found that Mexican imports were subject to investigation.

In *Chaparral*, the Federal Circuit reversed the Court of International Trade and confirmed the Commission's 1985 refusal to cumulate unfairly traded imports of steel from Spain and South Africa subject to countervailing duty orders issued in 1982 and 1983, with Norwegian steel imports under investigation. In addition to explaining the three preliminary factors that cumulable imports must be subject to investigation, in competition with like products, and marketed reasonably concurrently, the court defined the provision "subject to investigation." The Commission interpreted this factor to include only those imports under investigation on the day the Commission made its final injury determination ("vote day"), those imports proven to be unfairly traded, and those with continuing impact as of vote day. Additionally, imports subject to investigation must cause present material injury.

However, the Federal Circuit in *Chaparral*, 901 F.2d at 1097, actually upheld the Commission's refusal to cumulate unfairly traded Spanish and South African imports which entered prior to 1983, on the grounds the imports did not "*contemporaneously compete* with the Norwegian imports" under investigation. *Id.* at 1105 (emphasis added).

In *Norwegian Salmon*, an action which did not involve cumulation, the court reiterated that the Commission must determine whether imports caused present material injury to the domestic industry. In that case, the court reversed the Commission's finding that negative lingering effects from an injury caused by the presence of imported Norwegian salmon in mid-1988 to 1989 comprised present material injury in 1991.

In the case at bar, imports of Mexican cement were subject to a final antidumping duty order published August 30, 1990. *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 35,443 Sep't Comm. 1990) (Antidumping Duty Order). In the instant case, the Commission majority voted several months later on April 23, 1991 to cumulate imports of

Mexican cement which entered the United States prior to August 30, 1990 with the subject Japanese imports. In order to satisfy the requirement that Mexican imports still be subject to investigation on vote day, the Commission relied upon its longstanding "recent order exception." Under the exception, Commission precedent provides that imports subject to a very recent order may continue to contribute an injury to the domestic industry, and are therefore properly cumutable.

Plaintiffs contend that the combined holdings in *Chaparral* and *Norwegian Salmon* provide that lingering effects of previous unfairly traded imports cannot comprise present material injury. Plaintiffs argue that therefore imports entering prior to a recent order cannot as a matter of law cause present material injury on vote day. In essence, *Chaparral* and *Norwegian Salmon* implicitly overrule the recent order exception.<sup>4</sup>

The court is not persuaded by plaintiffs expanded reading of *Chaparral* and *Norwegian Salmon*. It is clear that on its face *Chaparral* did not reject the recent order exception. Instead, the court affirmed the Commission's refusal to cumulate Spanish and South African imports because they failed to *compete contemporaneously* with Norwegian imports. The Commission's determination did not reject cumulation on the grounds that the imports were no longer subject to investigation.

Moreover, while the *Chaparral* court did not directly examine the recent order exception, it recognized that, in fact, merchandise imported prior to an antidumping or countervailing duty order may cause present material injury on vote day. Specifically, when concluding that the Commission may as a policy reasonably evaluate candidates for cumulation based upon effects of unfair trading as of vote day, the court observed that in that case, the record was devoid of facts "to prove residual effects [on vote day] of unfairly traded imports that [entered prior to an antidumping or countervailing order, and which] cause present injury to the domestic industry. We therefore need not determine whether any such effects have dissipated." *Chaparral*, 901 F.2d at 1105 n. 8.

Similarly, in *Norwegian Salmon*, this court found that lingering effects of a previous injury cannot comprise present material injury. It did not determine that earlier imports cannot ever cause present injury on vote day. See No. 92-196 (CIT October 23, 1992).

The Commission itself has also recently permitted cumulation of imports subject to a recent order because the merchandise continued to cause present material injury. In *Industrial Nitrocellulose from Yugo-*

<sup>4</sup> Plaintiffs also cite to *United Engineering and Forging v. United States*, 15 CIT \_\_\_, 779 F. Supp. 1375 (1991) as support for the proposition that *Chaparral* abrogated the recent order exception. However, *United Engineering*, which concerned significantly different facts and issues than in either *Chaparral* or the case at bar, simply listed in *dicta* in connection with its discussion of an unrelated matter that: "Cf. *Chaparral Steel Company v. United States*, 901 F.2d 1097, 1105 (Fed.Cir. 1990) (imports no longer subject to a pending investigation not subject to cumulation)." *Id.* at 1393. *United Engineering* did not address the facts underlying *Chaparral*, or the actual legal basis upon which the Commission and the Federal Circuit reached their determinations. Neither did it consider the recent order exception. This court finds the brief reference in *United Engineering* to the professed holding of *Chaparral* to be of little probative weight in the present context.

*slavia*, USITC Pub. 2324, Inv. No. 731-TA-445 (Final) (Oct. 1990), the Commission justified its decision to cumulate imports by stating that:

unfair imports [which] entered prior to imposition of duties are still present in the marketplace and may still impact the domestic industry. The length of time of this continuing impact may vary from case to case depending upon such factors as the nature of the distribution system and the size of existing inventories. \* \* \* For this reason, the Commission cumulates imports subject to an outstanding antidumping or [countervailing duty] order when that order is recent. *Id.* at 6-7.

The court finds, therefore, that based upon the record in this action, relevant case law, and administrative precedent, imports entering the United States prior to an order are not prohibited as a matter of principle from causing present injury. The issues of whether imports subject to a recent order produce present injury to a industry, or whether the impact from those imports improperly reflected a previous injury with lingering effects are fact-based determinations which the Commission and the courts must address on a case-by-case basis. Accordingly, the court must evaluate whether substantial evidence supports the Commission majority's determination that imports of cement from Mexico contributed to present injury.

In support of its finding that imports of Mexican cement caused present injury, the Commission majority explained only that:

The imports from Mexico which enter Southern California compete with the subject imports from Japan and the domestic like product. As the Commission has frequently noted, cement is a fungible commodity, which competes largely on the basis of price. Imports from Mexico and Japan have been simultaneously present in the California market during the period of investigation. Imports from Mexico and Japan share common or similar channels of distribution, being imported through bulk import terminals and distributed throughout the region in the same manner. Commission Report at 30-31 (footnote omitted).

The court finds it important to emphasize that an agency "must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The agency must articulate a rational connection between the facts found and the choice made. *Id.* at 168. Any determination that cumulation is appropriate must therefore contain findings that imports from the candidate for cumulation were "definitely determined \* \* \* to contribute to present material injury." *Chaparral*, 901 F. 2d at 1097, 1104 (emphasis added).

The Commission majority's explanation in its determination failed to include any discussion or evidence whatsoever showing that imports of cement from Mexico prior to the August 30, 1990 order caused *present* material injury to the domestic industry on its April 23, 1991 vote day. As aptly noted by plaintiffs, neither present competitive market

conditions nor inventory levels of Mexican imports were examined or discussed.

Defendants assert that inventory levels are irrelevant to a finding of present injury because the Commission majority recognized that "inventories are not a significant factor in the cement industry." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record (Defendants' Memorandum") at 52 n. 65. However, the evidence shows that on vote day, inventory levels of Mexican cement were very low. See Commission Report at 77 n. 26. As noted by Commissioner Brunsdale:

[t]his provides compelling evidence that any cement imported into the United States prior to the entry of the final order in the Mexican Cement case would have been sold well before the conclusion of the present investigation. Thus, any Mexican cement currently being sold in the United States is fairly traded and should not be cumulated with Japanese cement in determining injury in the present case. Commission Report at 77 n. 26.

Moreover, an independent review of the record demonstrates only the historical position which Mexican cement held in the market. For example, the evidence shows that the domestic industry lost market share despite surging demand for cement from 1986 through 1989, and the effects of this lost market share had a significant adverse impact on the condition of the industry over the long run. Commission Record at 28, 29. At best, this evidence demonstrates a past injury caused by imports of Mexican cement. Not only is evidence of this nature clearly inadequate to show present material injury, but it runs counter to one of the overriding principles behind United States unfair trade laws, namely that antidumping and countervailing duties serve a remedial purpose. *Chaparral*, 901 F.2d at 1097, 1103.

In summary, the court holds that no evidence in the Commission majority's determination supports the finding that Mexican imports caused present material injury. The Commission majority's determination to cumulate imports of cement from Japan with imports of Mexican cement was therefore not supported by substantial evidence, and must be reversed.

Lastly, defendants argue that even should the court determine that cumulation was assessed improperly, the Commission specifically found that imports of unfairly traded Japanese cement alone caused injury and it would have "rendered an affirmative determination even had we not cumulated Mexican imports." Commission Report at 36 n. 93.

In its determination, the Commission majority based this conclusion upon the generalizations that Japanese imports increased steadily until 1990, and the "record shows substantial underselling by the Japanese imports, which we believe has led to the suppression and depression of prices for the domestic like product." Commission Report at 36 n. 93.

However, as noted previously, an agency must make findings supporting its decision which are supported by substantial evidence. Fur-

ther, a rational connection must exist between the facts found and the choice made. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The handful of broad statements made by the Commission majority do not begin to satisfy the criteria that the Commission's injury determination must be supported by rationally-based findings.

Accordingly, the court finds that substantial evidence does not support the Commission majority's conclusion that sales of Japanese cement caused material injury material to the regional industry even when viewed independently of Mexican cement. The court therefore remands this action to the Commission. Upon remand, the Commission is directed to determine whether imports from Japan caused material injury without cumulation of Mexican imports in its analysis, and to provide a full and complete explanation of its subsequent decision.

#### V. Causation based on Underselling and Price Effects:

Title 19 United States Code, Section 1677(7)(B) (1988) provides that when making its material injury determination, the Commission shall consider:

- (I) the volume of imports of the merchandise which is the subject of the investigation,
- (II) the effect of imports of that merchandise on prices in the United States for like products, and
- (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; \* \* \*.

Title 19 USC § 1677(7)(C)(ii) (1988) specifies that in evaluating the second factor of price effects, the Commission shall consider whether:

- (I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
- (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

Plaintiffs challenge only three aspects of the Commission majority's price effects analysis. As a background to their first objection, plaintiffs explain that the Commission majority divided Southern California into four market areas, namely Los Angeles, Orange County, Riverside County, and San Diego.<sup>5</sup> The Commission majority found that weighted average prices in each area declined over the period of investigation, before increasing during the last nine months of 1990. The Commission majority also determined that Japanese prices were mixed during this period, but also generally declined. Accordingly, the Commission majority concluded that "both price depression and price suppression may have occurred \* \* \*." Plaintiffs' Memorandum at 46, quoting Commission Report at 39.

<sup>5</sup> The Commission also obtained price information from the San Francisco area in Northern California.

In their first challenge, plaintiffs argue that the Commission majority inexplicably varied from its "traditional" test for determining whether price suppression or depression was present. Pursuant to a "traditional" analysis, the Commission examines cost trends within the domestic industry, in that changes in net sale prices are compared with changes in costs. Had the Commission majority performed this evaluation, the evidence would have shown that prices declined because the cost of goods sold [ ] since 1986.

The court notes initially that the statutory scheme is silent regarding the weight, if any, which the Commission should assign to cost trends in its price effects analysis. Further, contrary to plaintiffs' position, the Commission's does not appear to maintain a "traditional" test for determining price suppression or depression. In the past, the Commission has calculated price effects without examining trends in costs. See *Certain Steel Pails from Mexico*, USITC Pub. 2205, Inv. No. 731-TA-435 (Prelim.) (July 1989); *Chrome-Plated Lug Nuts from the People's Republic of China and Taiwan*, USITC Pub. 2427, Inv. Nos. 731-TA-474-475 (Final) (Sep't. 1991); *Certain Gene Amplification Thermal Cyclers and Subassemblies Thereof from the United Kingdom*, USITC Pub. 2412, Inv. No. 731-TA-485 (Final) (Aug. 1991). The Commission has also investigated price effects with consideration given to cost trends. See *Minivans from Japan*, USITC Pub. 2402, Inv. No. 731-TA-522 (Prelim.) (July 1991); *Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People's Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey and Yugoslavia*, USITC Pub. 2374, Inv. No. 701-TA-307 (Prelim.) (Apr. 1991).

Because the statute is not clear on its face and Commission precedent is not definitive, the court must determine whether in this case the Commission majority's exclusion of cost trends from its price effects analysis was reasonable and permissible. See *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984). The court recognizes that Congress provided the Commission with broad discretion in analyzing and assessing the significance of the evidence on price undercutting. *Copperweld Corp. v. United States*, 12 CIT 148, 682 F. Supp. 552 (1988). However, the Commission's determination must still be reasonable and supported by the record as a whole. *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556 (1984).

While the record contained evidence of underselling by the imports under investigation and decreasing transaction prices in the context of increased demand and capacity utilization, significant evidence also demonstrated that costs declined during the subject period. (Commission Report at 43, Staff Report at A-37, and Table 15.) In fact, the Commission majority itself acknowledged that declines in costs contributed to increased operating income margins within the industry. (Commission Report at 43.) However, despite this evidence, the Commission majority failed to discuss the impact of these cost trends on prices in the

industry, and did not examine whether such declining costs, rather than the unfairly traded imports, materially caused decreasing prices.

The court emphasizes that while unfairly traded imports may have actually caused price depression or suppression in this case, the Commission cannot simply ignore significant contradictory evidence and assert that, nevertheless, its determination was supported by substantial evidence. "The [Commission] is obligated to weigh all the pertinent evidence gathered in an investigation in reaching a determination." *Roses, Inc. v. United States*, 13 CIT 662, 665, 720 F. Supp. 180 (1989). An agency must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197 (1941)).

The court determines, therefore, that in this case, the Commission could not reasonably evaluate the effect of the subject imports on prices in the United States by overlooking the impact, if any, of declining costs within the domestic industry. The court therefore remands this determination to the Commission. Upon remand, the Commission is instructed to explain the impact of these cost trends upon prices. Based upon that finding, the Commission is directed to re-evaluate whether unfairly traded imports caused depression or suppression within the industry, and whether the domestic industry was injured by reason of unfairly traded Japanese imports.

Next, in their second challenge, plaintiffs assert that "the record here and past precedent" shows that the four market areas into which the Commission majority divided Southern California were too broad to allow "any meaningful price comparisons to be made for cement, a product whose high transportation costs create significant differences in competitive conditions between areas only a few miles apart." Plaintiffs' Memorandum at 48, 49 (footnote omitted).

Plaintiffs base their objection upon a single 1983 Commission determination, *Portland Hydraulic Cement from Australia and Japan*, USITC Pub. 1440, Inv. Nos. 731-TA-108 and 109 (Final) (Oct. 1983), *aff'd*, *Gifford-Hill Cement Co. v. United States*, 9 CIT 357, 615 F. Supp. 577 (1985). In that case, the Commission collected pricing data from approximately 70 transportation, or delivery, zones within Southern California.

The court notes that the Commission is not statutorily bound to undertake a particular pricing analysis, and "[i]n the absence of a statutory requirement, the Commission's discretionary election not to conduct [a specific] analysis does not render its determination contrary to law." *Negev Phosphates, Ltd. v. U.S. Department of Commerce*, 12 CIT 1074, 1091, 699 F. Supp. 938 (1988). In all actions subsequent to *Portland Hydraulic Cement from Australia and Japan* that involved unfairly traded cement or cement clinker, the Commission obtained pricing information from major markets, rather than subzones. See *Gray Portland Cement and Cement Clinker from Venezuela*, USITC

Pub. 2400, Inv. Nos. 303-TA-21, 731-TA-519 (Prelim.) (July 1991); *Gray Portland Cement and Cement Clinker from Mexico*, USITC Pub. 2305, Inv. No. 731-TA- 451 (Final) (Aug. 1990); *Portland Hydraulic Cement and Cement Clinker from Columbia, France, Greece, Japan, Mexico, the Republic of Korea, Spain, and Venezuela*, USITC Pub. 1925, Inv. Nos. 731-TA-356-363 (Prelim.) (Dec. 1986).

Moreover, plaintiffs failed to point to any actual evidence in the record which demonstrates that use of a major market analysis adversely influenced price comparisons. For example, while plaintiffs' posited that subzones were appropriate because the Commission majority commented generally that the sample used "may not completely accurately represent pricing patterns in the Southern California market," a review of the record shows that the Commission majority's statement was unrelated to a determination of whether a subzone analysis was more appropriate. Commission Report at 40. It simply prefaced the Commission majority's finding that, nevertheless, consistent underselling along with domestic price reduction prompted by lower priced imports demonstrated the significant adverse effect which imports had in the market. Commission Report at 41.

Accordingly, the court finds that the Commission majority's determination to collect information from four market areas in Southern California was supported by substantial evidence.

In their last objection to the Commission majority's evaluation of price effects, plaintiffs contend the Commission majority improperly excluded consideration of the vast majority of imports into the regions because they were sold in related party transactions. As a result, price comparisons were made upon a limited data base, which accentuated the bias already present in the price sample.

However, the record demonstrates that cement transferred between [ ] Confidential Document No. 18 at 54. Plaintiffs failed to show that exclusion of these transactions was improper, or how it biased the Commission majority's determination. Indeed, the Commission majority noted to the contrary that exclusion of related party sales prices eliminated "one of the elements which might skew the information." Commission Report at 40 n. 111.

Consequently, the court finds that the Commission majority's analysis of price effects was, in part, supported by substantial evidence. Further, the Commission majority's determination is, in part, remanded to the Commission.

#### VI. Commissioner Rohr's Threat of Injury Finding:

Plaintiffs next assert that the Commission majority's determination that the relevant domestic industry was threatened with material injury was not supported by substantial evidence.

Title 19 United States Code 1677(7)(F)(ii) (1988) provides in this regard that:

Any determination by the Commission \* \* \* that an industry in the United States is threatened with material injury shall be made

on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition.

After an analysis of the evidence presented to the Commission, Commissioner Rohr determined that the regional industry was sufficiently threatened with material injury. Plaintiffs now claim that this determination was not sufficiently supported. In particular, plaintiffs argue that Commissioner's Rohr's threat determination was based upon four simple, but inaccurate findings, namely that the Southern California region was vulnerable to increased imports, excess Japanese production capacity existed, import terminals served the region, and that underselling by Japanese imports occurred.<sup>6</sup> Plaintiffs' Memorandum at 52.

It bears repeating that the responsibility of the court is to determine whether the Commissioner's determination was supported by substantial evidence. 19 U.S.C. 1516a (b)(1)(B) (1988). The court's function is not to decide whether it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927 (1984). The agency's finding may well be supported by substantial evidence even though the possibility of drawing two inconsistent conclusions from the evidence exists. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

In this case, a review of the record demonstrates that Commissioner Rohr's determination was neither limited to the narrow grounds outlined by plaintiffs, nor was it unsupported as a whole by substantial evidence. In point of fact, Commissioner Rohr found that the regional industry was threatened with material injury because of its vulnerability to injury by dumped imports, the existence of excess Japanese cement production capacity, a rapid increase in volume of imports and import penetration into the region, underselling by Japanese imports along with its negative effect on prices, and Japanese investment in import terminals. Commission Report at 50-65.

The court will, however, address plaintiffs' specific assertions that certain of these findings were not based upon substantial evidence. Plaintiffs' first contention was the sweeping generalization that Southern California was not "vulnerable" because: "the [ ] and the [ ]. Even the industry aggregate data indicated a healthy regional industry." Plaintiffs' Memorandum at 52.

A review of the entire record shows that notwithstanding plaintiffs' contentions, the evidence supports Commissioner Rohr's determination of industry vulnerability. Commissioner Rohr himself noted that a downward trend in the "actual performance of producers and in the percentage of producers operating at levels that I conclude are not indicative of injury" showed "serious vulnerability" to potential effect of unfairly traded imports. Commission Report at 61. Commissioner Rohr

<sup>6</sup> Plaintiffs do not object to any other aspect of Commissioner Rohr's finding of underselling than those challenged in connection with the Commission majority's determination. Because the court previously addressed these arguments under § V, *supra*, they need not be revisited here.

also referenced the evidence that fewer producers existed and "smaller percentages of regional production [were] accounted for by producers operating at high levels \* \* \*." Commission Report at 61. Further, the industry was unable to increase its capacity. Commission Report at 61. Evidence also supported Commissioner Rohr's finding that a major reason for the financial present performance of the industry was its ability to reduce costs, but that the "potential for further significant cost reductions" appeared limited. Commission Report at 61. Moreover, contrary to plaintiffs' contentions, as discussed previously in § III of this opinion, evidence supports the finding that [ ] did indeed [ ].

The court notes that plaintiffs failed to discredit or undermine any of the evidence supporting Commissioner Rohr's finding of industry vulnerability. The court concludes that this aspect of the Commissioner's determination was supported by substantial evidence.

Next, plaintiffs assert that Commissioner Rohr's analysis of existing Japanese production capacity was filled with speculation. Plaintiffs contend that Japanese production capacity utilization alone increased, rather than its production capacity. During this period, Japan began modernizing its kilns and kilns were removed from operation, which caused capacity to decrease and capacity utilization to increase. Additionally, plaintiffs argue that an expanding Japanese home market absorbed all available cement production. Plaintiffs conclude that even assuming actual production increased in Japan, Commissioner Rohr simply speculated that excess production would be exported to the United States.

However, plaintiffs' arguments miss the point of Commissioner Rohr's reliance upon evidence of Japanese production capacity. The Commissioner found that cement capacity utilization was important because it "remained only at 90 percent, *below* that which would appear optimal for cement producers. In addition, this 10 percent unused capacity represents an amount of cement equal to or exceeding the entire apparent consumption of cement in Southern California." Commission Report at 62 (footnote omitted, emphasis added). Plaintiffs also failed to point to any evidence contradicting the Commissioner's reliance upon indications that the Japanese home market might not absorb this excess capacity. See Confidential Document No. 19 at 108-110, Exhibits 67, 68, 69.

Plaintiffs were also unable to discredit Commissioner Rohr's findings that imports increased from 1986 until Commerce's suspension of liquidation in 1990<sup>7</sup>, as did import penetration. Plaintiffs did not undermine Commission Rohr's conclusion that even in the absence of any further increases, present levels were likely to be injurious in the future. Commission Report at 63-64.

<sup>7</sup> Imports subsequently declined, however, the Commission may permissibly give little weight to decreases in imports following initiation of an investigation or preliminary dumping determination by Commerce. *Rhone Poulenc, S.A. v. United States*, 8 CIT at 47, 53, 592 F. Supp. 1318 (1984).

The court finds that Commissioner Rohr's examination of Japanese excess cement production capacity was in accordance with law.

Finally, plaintiffs challenge as speculative Commissioner Rohr's determination that Japanese investment in import terminals with large throughput capacity was an adverse trend that indicated threatened, actual injury.<sup>8</sup> See Commission Report at 64-65. Plaintiffs contend that since the Japanese investors also owned the [ ] in Southern California, their interests were "similar" to petitioners. It would be economically unwise to "source cement from their import terminals because doing so would jeopardize optimal returns on their domestic production investments." Plaintiffs' Memorandum at 57 (footnote omitted).

Plaintiffs also argue that because one terminal was under construction during the period of investigation and would not receive cement until late 1991, no evidence showed that it presented an "imminent" threat. Moreover, the remaining terminals did not maintain any [ ], and imports of Japanese cement declined in 1990.

However, the court notes again that it must determine whether substantial evidence supports the Commission's determination, even though inconsistent conclusions may be drawn from the evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). The evidence shows that Japanese exporters acquired or invested in import terminals and ready-mix concrete producers in Southern California.<sup>9</sup> Based upon this evidence, the court finds that Commissioner Rohr's finding that "[s]uch investments would be extremely uneconomical unless used, and it is reasonable to believe that Japanese cement could be a major source of throughput supply" was reasonable. Commission Report at 65.

In summary, the court determines that the record viewed *in toto* demonstrates that substantial evidence supports Commissioner Rohr's findings that the regional industry was threatened with material injury.

#### VII. Commission Investigation of Support for Petition:

In their final argument, plaintiffs challenge the Commission's refusal to evaluate petitioners' standing to bring the petition that was asserted in plaintiffs' request for termination. Plaintiffs contend that the theory relied upon by the Commission—that such an investigation was only within Commerce's discretion—was inappropriate here. Plaintiffs contend that while the Commission's position may be permissible in certain cases, the Commission must analyze standing in the present action because Commerce abdicated its responsibility to do so, and, in any event, the standing evaluation depends on the final determination by the Commission. Specifically, they argue that the issue of whether the petition was brought on behalf of the industry derives from the Commission's

<sup>8</sup> Commissioner Rohr concluded that "[s]uch investments would be extremely uneconomical unless used, and it is reasonable to believe that Japanese cement could be a major source of throughput supply." Commission Report at 65.

<sup>9</sup> See Confidential Document No. 39 G at A-30 and A-75-A-76, Confidential Document No. 19 at 112-117.

delineation in its final determination of the applicable regional industry. Consequently, even if Commerce had acted appropriately, it could not have evaluated standing.

In response, the Commission argues that statutory and case law provide that Commerce alone maintains the authority to investigate petitioners' standing, or to dismiss petitions on these grounds.

The governing statute, 19 U.S.C. § 1673a(b) (1988), mandates that an antidumping petition must be filed "on behalf of an industry." Subsection (c) of Title 19 United States Code, Section 1673a (1988) provides that Commerce shall determine whether the petition alleges all necessary elements within 20 days after filing of the petition.

Additionally, the Federal Circuit recently explained in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 10 Fed. Cir. (T) \_\_\_, 966 F.2d 660, 665 n. 6 (1992) in regard to the statutory requirement that a petition be filed on behalf of an industry, that:

Although both Commerce and the [Commission] are "charged" with administering different parts of the Act, it is Commerce who determines that a petition is sufficient to cause the initiation of investigations—that the statutory requirements are satisfied. The [Commission]'s position in its brief is that it defers to Commerce's initial determination, and that only Commerce can review that determination. This is a reasonable and permissible interpretation of the Act's delineation of respective responsibilities.

Therefore, the court's obligation is to ascertain whether the Commission decision to defer to Commerce was again a "reasonable and permissible" determination. The court finds that under the facts of this action, the Commission's finding was so supported. None of the "unique" facts of this case which plaintiffs' claim distinguish it from *Suramerica*, actually do so.

As in *Suramerica*, 966 F.2d at 660, the Commission found that Commerce was the appropriate agency to make standing determinations. The Commission's interpretation did not cause plaintiffs to forfeit a challenge to any aspect of standing. Moreover, as the Commission majority noted in its determination, the request for termination submitted to the Commission was not supported by any confidential information developed in the Commission investigation, and "all the facts on which the Termination Request [was] based were known to respondents before the deadline established by Commerce's regulations for challenging a petitioner's allegations of standing, and therefore such a challenge could have been brought before Commerce in a timely fashion." Commission Report at 12-13.

The court therefore concludes that the Commission's decision in the action to defer the standing analysis to Commerce was reasonable and permissible.

## CONCLUSION

For the reasons provided above, this court holds that the Commission's final determination regarding gray portland cement and cement clinker from Japan was, in part, supported by substantial evidence and in accordance with law, and in part insufficiently supported and not in accordance with law. Accordingly, the Commission's determination is sustained in part, and plaintiffs' motion for remand is granted in part.

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(Slip Op. 93-63)

SURAMERICA DE ALEACIONES LAMINADAS, C.A., CONDUCTORES DE ALUMINIO DEL CARONI, C.A., INDUSTRIA DE CONDUCTORES ELECTRICOS, C.A., AND CORPORACION VENEZOLANA DE GUAYANA, PLAINTIFFS *v.* UNITED STATES, U.S. INTERNATIONAL TRADE COMMISSION, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND SOUTHWIRE CO., DEFENDANT-INTERVENOR

Court No. 88-09-00726

[Defendant's motion for an order to show cause why response time should not be shortened is denied]

(Dated April 29, 1993)

*Arnold & Porter (Patrick F.J. Macrory, Michael Faber, Claire E. Reade Edward Sisson); Shearman & Sterling (Thomas B. Wilner, Jeffrey M. Winton)* for plaintiffs.

*Stuart E. Schiffer*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*M. Martha Ries Michael Kane*); *Lynn M. Schlitt*, General Counsel, United States International Trade Commission; *James A. Toupin*, Assistant General Counsel, United States International Trade Commission (*Stephen A. McLaughlin, Carol McCue Verratti*); *Robert H. Brumley*, General Counsel, U.S. Department of Commerce for defendants.

*Wigman, Cohen, Leitner & Myers, P.C. (Victor M. Wigman, Ralph C. Patrick, Dorothy H. Patterson); McKenna, Conner & Cuneo (Peter Buck Feller, Lawrence J. Bogard)* for defendant-intervenor.

*Baker & McKenzie (William D. Outman II, Arthur L. George)* for General Electric Co., *Amicus Curiae* in support of plaintiffs.

## MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge*: United States International Trade Commission (the Commission) moved on April 27, 1993 for a Stay of the Remand Order (dated March 15, 1993) and Entry of Judgment pending appeal of this Court's decision contained in Slip Op. 93-35 (March 15, 1993) to the Court of Appeals for the Federal Circuit. In conjunction with this motion, the Commission has concurrently moved for an Order to Show Cause Why Response Time Should Not Be Shortened, requiring each party to show cause why it is unable to respond to defendant's motion by April 30, 1993 or be precluded from filing with regard to defendant's motion for a stay.

This Court has required the Commission to issue its remand results within 60 days, *i.e.*, by May 14, 1993. The Commission has indicated that if this Court will not grant the stay, the Commission will seek a stay from the Court of Appeals for the Federal Circuit. As a reason for its April 30, 1993 deadline in the proposed Order To Show Cause, the Commission asserts that "[s]ubstantial delay of this Court's consideration of the Commission's motion might require the Commission to seek a stay from the Federal Circuit before this Court has acted \* \* \*." *Motion of Defendant United States International Trade Commission for Order to Show Cause why Response Time Should not be Shortened* at 2.

Defendant has taken over a month to decide on a course of action that it expects the opposing parties to evaluate and answer, and the Court to evaluate and decide, within the space of a few days. Were the Court to grant defendant's Order to Show Cause concurrently with this order, plaintiffs would have two days to respond. This is patently unfair and good cause has not been offered by the defendant to justify the imposition of such a burden. Therefore, it is hereby

ORDERED that defendant's motion for an Order to Show Cause why Response Time Should not be Shortened is denied. Plaintiff shall have the normal response time prescribed by this Court's rules.

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(Slip Op. 93-64)

UNITED STATES, PLAINTIFF *V.* MARSHALL PEEPLES AND  
SUGAR SUPPLY CO. INTERNATIONAL, INC., DEFENDANTS

Court No. 93-01-00066

[Defendant's motion to strike portions of the complaint and to make it more clear is denied. Defendant's motion for leave to file a response to plaintiff's opposition is denied]

(Dated April 30, 1993)

*Stuart E. Schiffer*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Patricia L. Petty*) for plaintiff.

*Thomas J. Lindmeier* (*Thomas J. Lindmeier, Jacqueline C. Chase*) for defendant.

#### MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge*: Defendant has moved for an order to strike the amended complaint and to make the amended complaint more definite and certain. Plaintiff opposes this motion. Defendant also has moved for leave of the Court to file a response to plaintiff's Opposition to Defendant's Motion for a More Definite Statement and Motion to Strike. Plaintiff did not respond to defendant's latter motion.

A portion of defendant's earlier Motion to Strike and Motion to Make More Definite and Certain alleges that part of paragraph 13 of Plaintiff's Amended Petition should be stricken. Defendant contends that this Motion to Strike is a dispositive motion as that term is used in USCIT Rule 7 (d).<sup>1</sup> In the Court's view, since defendant's motion would not dispose of this case even if granted, said motion is not dispositive and defendant is thereby not entitled to a reply as a matter of right. Had defendant filed a motion to dismiss, for example, he would have been entitled to a reply.

Furthermore, upon due consideration, the Court chooses not to exercise its discretion to allow the reply. Rather, the Court finds that plaintiff has adequately pleaded its case, with sufficient clarity and precision, so that defendant is on notice of the claims levied in the complaint and may defend against them. In addition, plaintiff has offered to amend its complaint yet again, in order to elaborate paragraph 13 even further. *The Court encourages plaintiff to do so promptly.*

The USCIT rules and procedures are designed to streamline litigation. Motions to strike under USCIT Rule 12(f), which is identical to Rule 12(f) of the Federal Rules of Civil Procedure, are disfavored by the courts and are infrequently granted. *Heraeus-Amersil, Inc. v. United States*, 8 CIT 329, 335, 600 F. Supp. 221, 226 (1984), later proceeding, *Heraeus-Amersil, Inc. v. United States*, 9 CIT 262, 612 F. Supp. 396 (1985), vacated, set aside, summ. judgment granted, in part, *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 617 F. Supp. 89 (1985), later proceeding, *Heraeus-Amersil, Inc. v. United States*, 10 CIT 438, 638 F. Supp. 342 (1986), aff'd *Heraeus-Amersil, Inc. v. United States*, 2 Fed. Cir. (T) 95, 795 F.2d 1575 (1986); *Stabilisierungsfonds Fur Wein v. Kaiser Etc.*, 647 F. 2d 200, 201 (D.C. Cir. 1981). Defendant's Motions to Strike the Amended Complaint and Motion to make the Amended Complaint More Definite and Certain more closely resemble challenges to discovery and a request for trial through pleadings than valid requests for the clarification of a complaint. The Court can see no prejudice to defendant in the Amended Complaint, as it now exists. In contrast, defendant's motion would result in needless delay and premature discovery.

The granting of a motion to strike constitutes an extraordinary remedy and should be granted only where there has been a flagrant disregard of the rules of the Court. *Fujitsu General, Ltd v. United States*, Slip Op. 91-72 (CIT Aug. 19, 1991); *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986). The government has not flagrantly disregarded the rules of the Court. Upon due consideration, It is hereby

ORDERED that Defendant's Motion for a More Definite Statement and Motion to Strike is denied. It is further

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<sup>1</sup> The Court presumes that defendant thereby refers to the following language in Rule 7(d): "The moving party shall have 10 days after service of the response to a dispositive motion to serve a reply."

ORDERED that Defendant's Motion for Leave of Court to file Reply to Plaintiff's Opposition to Motion to Strike and Motion to Make More Definite and Certain is denied. Finally, it is

ORDERED that Plaintiff has permission to file its amended Amended Complaint with the Court within 15 days.

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(Slip Op. 93-65)

FORMER EMPLOYEES OF HEWLETT-PACKARD CO., PLAINTIFFS *v.*  
UNITED STATES, DEFENDANT

Court No. 92-02-00072

[Motion for leave to file, out of time, motion for extension of time to file remand results granted. Motion for extension of time granted.]

(Dated April 30, 1993)

*Edward P. Van Pelt, pro se*, for plaintiffs.

*Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Jeffrey M. Telep*), *Scott Glabman*, of counsel, United States Department of Labor, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge*: This action comes before the court on the court's order to defendant to show good cause for failure to file remand results and defendant's motion for leave to submit, out of time, a motion for an extension of time to file its remand determination and defendant's motion for an extension of time.

In its opinion of January 21, 1993, this court reversed the final negative determination regarding eligibility for trade adjustment assistance issued by the Secretary of Labor, *Koh-l-Noor Rapidograph, et.al.*, 56 Fed. Reg. 58711 (Dept Labor 1991) (Negative Eligibility Determination); *Hewlett-Packard Co., Rockaway, N.J.*, 56 Fed. Reg. 67103 (Dept Labor 1991) (Application for Reconsideration Dismissal). *Former Employees of Hewlett-Packard Co., v. United States*, No. 93-8 (CIT Jan. 21, 1993).

In its decision, the court remanded the case to the Secretary of Labor ("Labor"). Labor was directed to provide a remand determination regarding certification in accordance with the views expressed in the opinion within 30 days of January 21, 1993.

Labor failed to comply with the court's order and did not submit a determination upon remand. Labor also failed to file a motion for an extension of time.

Consequently, on March 11, 1993 the court ordered Labor to show good cause why it failed to submit its remand determination in accor-

dance with the court's opinion. The court at the same time sought information as to why a determination in favor of plaintiffs in the underlying action should not be issued on the grounds that Labor's denial of certification for trade adjustment assistance to plaintiffs was not supported by substantial evidence. Finally, the court sought information as to why the court should not require Labor to pay all reasonable expenses incurred by plaintiffs because of the failure to report the results of its remand determination in accordance with the order.

Labor filed its response to the court's order to show good cause on March 22, 1993. Pursuant to USCIT R. 6 and 7, defendant also submitted a motion for leave to file, out of time, a motion for an extension of time to file its remand determination. Defendant further filed a motion for an extension of time to and including May 6, 1993.

In its submissions, defendant claimed that its noncompliance with the court's order was substantially justified and that extenuating circumstances made an award of expenses unjust pursuant to USCIT R. 16(f).

Plaintiffs filed a reply to defendant's response to show good cause on April 7, 1993 claiming that defendant had not shown good cause.

#### DISCUSSION

USCIT R. 16(f) provides that:

If a party \* \* \* fails to obey a scheduling \* \* \* order, \* \* \* the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just \* \* \*. In lieu of or in addition to any other sanction, the judge shall require the party \* \* \* to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Furthermore, pursuant to USCIT R. 6(b)(1):

When \* \* \* by order of the court, an act is required to be done at or within a specified time, the court may upon motion, for good cause shown, order the period extended; \* \* \*.

Defendant argues that its reason for missing the filing deadline and its conduct after realizing its error justify the court's exercise of discretion in allowing the remand results to be filed out of time. Defendant bases its contentions upon excusable delay, stating that:

[a] secretary at Labor then made copies of the order and distributed a copy to the labor analyst. The secretary inadvertently omitted distributing the last page of the order, which contained the instruction to complete and submit the remand results within 30 days. Consequently, the analyst was unaware of the deadline for submitting the remand results. [ ] The undersigned was unaware that the remand results had not been timely filed until he received a telephone call from this court on \* \* \* March 5, 1993. \* \* \* [On] March 8, 1993, we filed a motion for an extension of time. \* \* \*

Defendant's Response to the Court's Order to Show Cause at 2.

The court, in its discretion, determines that defendant showed good cause. Moreover, should the court hold defendant to such an extraordinary showing of good cause that good cause did not exist, the court would also be finding that substantial evidence did not support Labor's denial of eligibility for trade adjustment assistance. A determination in favor of plaintiffs in the underlying action would be a penalty too severe since no prejudice was occasioned by the delay, and the request to file out of time was as prompt as reasonably possible in this action. See *Pistachio Group Asso. of Food Indus. v. United States*, 10 CIT 475, 642 F. Supp. 1176 (1986), *vacated on other grounds*, 11 CIT 537 (1987).

In so holding, the court would, however, like to emphasize that procedures for the efficient transmittal of correct and complete case files are the backbone of fair administration and justice. The present case indicates to the court that Labor should review existing procedures to ensure that similar incidents do not occur in the future.

For the reasons stated above, the court, pursuant to USCIT R.16(f) and 6(b), hereby

ORDERED that good cause has been demonstrated, and any award of expenses would be unjust. The court further

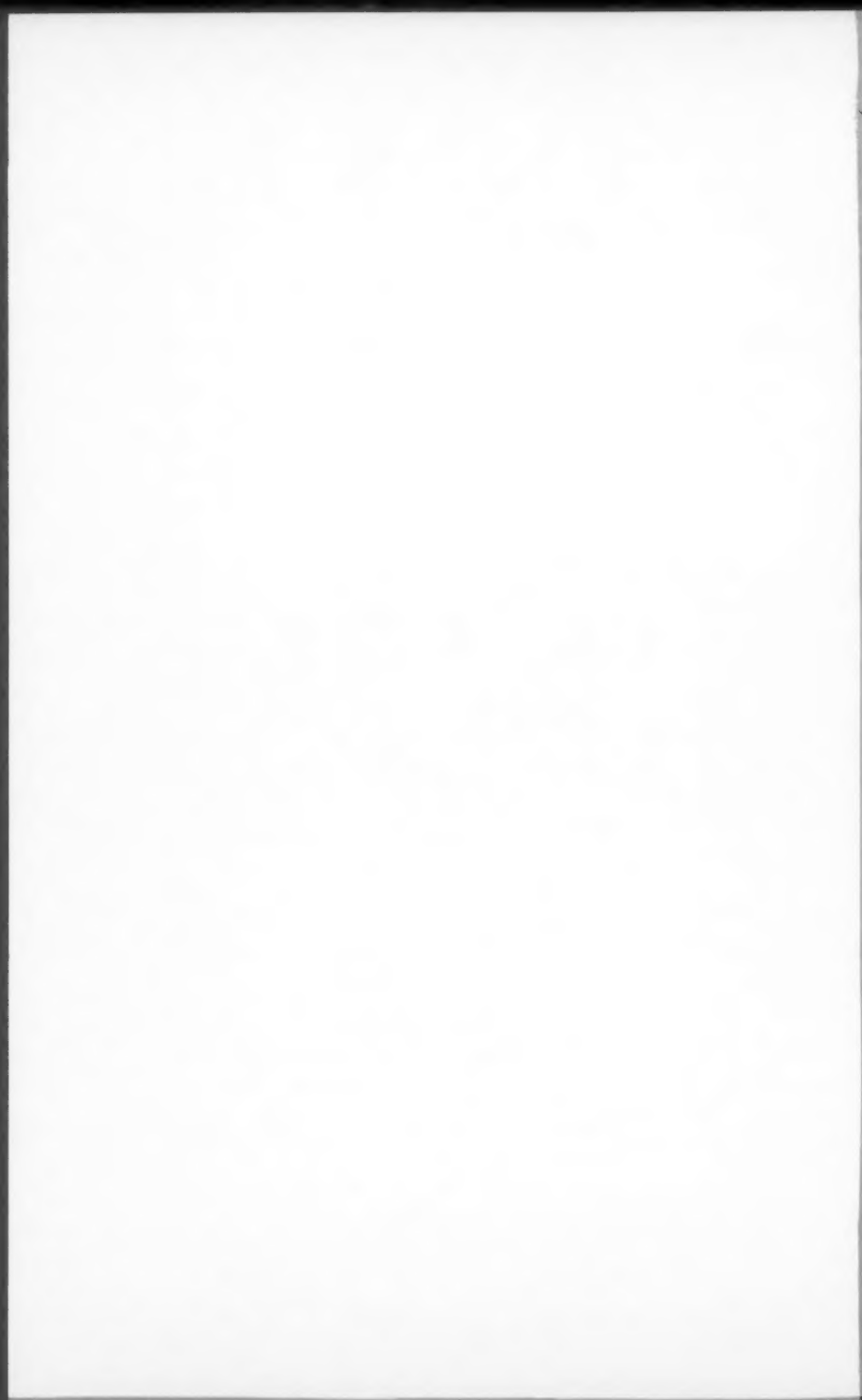
ORDERS that defendant's motion for leave to file out of time motion for an extension of time to file remand results is granted. The court also

ORDERS that defendant's motion for extension of time for submitting remand results is granted to and including May 6, 1993.

## ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/44 4/29/93 DiCarlo, J.	Mattel, Inc.	86-09-01216	737.95 12.3% 10.9%	912.20 Free of duty after January 27, 1983	Mattel Inc. v. United States 926 F.2d 1116 (1991)	Los Angeles Toys and parts of toys
C93/45 4/29/93 DiCarlo, J.	Mattel, Inc.	88-02-00131	737.95 12.3% 10.9% 9.6%	912.20 Free of duty after January 27, 1983	Mattel Inc. v. United States 926 F.2d 1116 (1991)	Los Angeles Toys and parts of toys
C93/46 4/29/93 DiCarlo, J.	Mattel, Inc.	88-09-00706	737.95, 737.49 12.3% 10.9% 9.6% 8.3%	912.20 Free of duty after January 27, 1983	Mattel Inc. v. United States 926 F.2d 1116 (1991)	Los Angeles Toys and parts of toys or toys stuffed or filled
C93/47 4/29/93 DiCarlo, J.	Mattel, Inc.	89-06-00305	737.49, 737.95 9.6% 8.3% 7.0%	912.20 Free of duty after January 27, 1983	Mattel Inc. v. United States 926 F.2d 1116 (1991)	Los Angeles Toy figures of inanimate objects or toys and parts of toys





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